Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

ELIZABETH PITTMAN, A MINOR UNDER 18 YEARS OF AGE BY FREDERICK PITTMAN HER FATHER AND LEGAL CUSTODIAN, AND FREDERICK PITTMAN, INDIVIDUALLY,

Petitioners,

v.

ICELANDAIR, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal law imposes on international airlines a "general duty to receive and transport . . . paying passengers," regardless of the fact that the passengers are openly traveling with tickets bearing false names, so as to entitle an airline that "intentionally assisted" the abduction of petitioner's daughter to overturn a $15 million jury award based upon the airline's deliberate interference with the parent-child relationship.

LIST OF PARTIES

The parties to the proceeding below were:

Elizabeth Pittman
Frederick Pittman

Plaintiffs-Appellants.

Erna (Etta) Pittman Grayson, a/k/a Erna Eyjolfsdottir
Helgi Hilmarsson
Gudmundur Karl Jonsson

Defendants.

Icelandair, Inc.

Defendant-Appellee.

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On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 26, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A, pp. 1a-28a, *infra*) is reported at 149 F.3d 111. The opinion of the United States District

Court for the Southern District of New York (Pet. App. B, pp. 29a-40a, *infra*) is not reported, but is found at 1997 U.S. Dist. LEXIS 9287. The order of the Second Circuit denying petitioners' request for rehearing (Pet. App. C, pp. 41a-42a, *infra*) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was issued on June 26, 1998. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on February 4, 1999. Justice Ruth Bader Ginsburg granted a timely application for extension of time to file a petition for writ of certiorari to and including June 4, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. § 44902 provides:

> (b) **Permissive refusal**—Subject to regulations of the Administrator, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

49 U.S.C. § 44909 provides:

> (a) **Air carrier requirements.** – (1) Not later than March 16, 1991, the Secretary of Transportation shall require each air carrier to provide a passenger manifest for a flight to an appropriate representative of the Secretary of State . . .
>
> (2) The passenger manifest shall include the following information:
>
> (A) the full name of each passenger.
>
> (B) the passport number of each passenger, if required for travel.

(C) the name and telephone number of a contact for each passenger.

(3) In carrying out this subsection, the Secretary of Transportation shall consider the necessity and feasibility of requiring air carriers to collect passenger manifest information as a condition of passengers boarding a flight of the carrier.

14 C.F.R. § 243.7 provides:

(a): For covered flight segments, each covered airline shall:

(1) Collect or cause to be collected, the full name for each passenger who is a U.S. citizen. U.S. citizen passengers for whom this information is not obtained shall not be boarded.

* * *

(3) Maintain a record of the information collected pursuant to this section.

STATEMENT

Introduction

This case concerns a $15 million jury verdict rendered against Icelandair for having deliberately interfered with the parental rights of a father who had obtained a Florida court order prohibiting his former wife from transporting their daughter out of the jurisdiction. The mother's second divorced husband similarly obtained another Florida court order barring the removal of his own daughter. Notwithstanding these two court orders, the mother – a native and citizen of Iceland with family having close ties to the employees of Icelandair – surreptitiously removed her daughters to Iceland with the active assistance of Icelandair employees. She accomplished the abduction by boarding an Icelandair flight at JFK Airport in New York City with non-

transferable tickets made out in false names that matched neither the true names on the temporary Icelandic passports that the members of the party were carrying nor the still different false names in which reservations had been made. Other conduct of Icelandair employees at JFK – including the falsification of the boarding manifest and the perjurious testimony of the second-in-command of Icelandair's JFK operations who had checked in the mother and the girls – established at trial that Icelandair had actively and knowingly collaborated in the clandestine removal from the United States of the two American children.

The jury returned a verdict of $10 million in compensatory damages and $5 million in punitive damages. On motions for a new trial and for judgment as a matter of law, the district judge concluded that even though Icelandair had received oral notice of the court orders prohibiting removal of the children, it also had "a duty to transport anyone who sought to use its services and was not free to refuse to transport" a mother who was abducting her children. Pet. App. B, p. 33a, *infra*. On appeal, the Second Circuit did not decide whether New York law recognizes a tort remedy for interference with the parent-child relationship because it agreed with the district court that the airline, "as a common carrier, had a general duty to receive and transport persons who offered themselves as paying passengers" (Pet. App. A, p. 25a, *infra*) regardless of whether their passport names matched the names on their tickets and whether the airline had been notified of the potential abduction. This petition presents for this Court a square conflict between federal law and the legal premise invoked by both courts below to permit a culpable airline to escape civil liability for participation in conduct that the district judge recognized would be criminal today under the federal statute on international parental kidnapping, 18 U.S.C. § 1204. *See* Pet. App. B, p. 36a, *infra*.

1. The Abduction of Elizabeth and Her Sister Is Planned.

In 1991, petitioner Frederick Pittman alleged in a Florida court that his former wife, Erna Eyjolfsdottir Pittman-Grayson ("Erna"), was unfit to raise their nine-year-old daughter, Elizabeth, and sought sole custody of the girl. Pet. App. A, p. 3a, *infra*. Elizabeth was then living in Florida with her mother and her four-year old step-sister from her mother's subsequent marriage to Brian Grayson, Anna Nicole Grayson. *Id.* A Florida judge in the custody proceeding issued a temporary restraining order prohibiting Erna from removing Elizabeth from the northwest Florida county over which the court had jurisdiction. *Id.* In parallel custody proceedings commenced by Brian Grayson to obtain sole custody of Anna, the state court issued a similar temporary restraining order and impounded the passports of Erna, Elizabeth and Anna. *Id.*

Beginning in March 1992, Erna made plans to abduct her two daughters to Iceland, where she had family, including her step-father, Gudmundur Karl Jonsson ("Jonsson"). Jonsson was the chief of the duty-free store in Keflavik Airport and was friendly with Icelandair executives and staff. *Id.* at 7a. Erna obtained provisional passports for herself and her daughters from the Icelandic Consulate in Florida. *Id.* at 4a. They bore the names "Erna Eyjolfsdottir," "Elizabeth Jeanne Pittman," and "Anna Nicole Grayson." *Id.* From Iceland, Jonsson then made reservations for Erna and the daughters to travel via Icelandair from JFK to Iceland on May 2, 1992, under the pseudonyms, "Ms. S. Hilmarsson," "Child A Hilmarsson," and "Child B Hilmarsson." *Id.* The surnames on the reservations matched the surname of Erna's Icelandic boyfriend, Helgi Hilmarsson, who independently obtained a reservation with an Icelandair ticketing agent in America for the same flight. *Id.*

On Easter Sunday 1992, Mr. Pittman and Mr. Grayson became suspicious that Erna might have fled the jurisdiction with Elizabeth and Anna. The next day, Mr. Grayson placed telephone calls to two of the three American offices of Icelandair (in Orlando and Baltimore). He informed two different representatives of Icelandair that he feared Erna would attempt to travel to Iceland with the girls in violation of court orders. *Id.* After ascertaining that Icelandair had no record of travel reservations in the legal names of Erna and the two girls, Mr. Grayson provided physical descriptions of the three. *Id.* at 5a. He informed Icelandair that he suspected they would travel under false names. *Id.*

2. Icelandair Knowingly Assists in the Clandestine Departure.

Four days after Mr. Grayson provided this information to Icelandair in the United States, someone in Iceland changed the reservations for the "Hilmarssons" in the Icelandair reservations system. *Id.* The departure date was altered to May 1, 1992, and the passenger names were changed from "Hilmarsson" to "Karlsson." *Id.* On May 1, 1992, Erna, Elizabeth and Anna checked in at JFK for Flight 614 bound for Keflavik. *Id.* The identity documentation provided by the three passengers revealed several irreconcilable discrepancies: The reservations were in the names of S. Karlsson, Ch. A. Karlsson and Ch. B. Karlsson while the non-transferable tickets had been purchased in the names of S. Hilmarsson, Ch. A. Hilmarsson and Ch. B. Hilmarsson, and the passports of the passengers bore the names of Erna Eyjolfsdottir, Elizabeth Jeanne Pittman, and Anna Nicole Grayson. *Id.* at 6a.

In a departure from his normal role, Icelandair's second-in-command, Olav Ellerup, checked in the three passengers personally. At trial, he perjuriously denied facts that had been admitted as true by Icelandair about his participation in checking in the mother and two girls. *Id.* By permitting

them to board the aircraft under these circumstances, Ellerup blatantly and knowingly violated Icelandair check-in protocol, which provides that Icelandair will "accept passengers" only upon "presentation of a ticket with a confirmed reservation for the flight" and instructs its agents to "compare name in passport to name on ticket." *Id.* at 6a.

The passenger manifest for Flight 614 on May 1, 1992, also reflected falsifications in the weight and balance codes required by federal law. *Id.* The codes – "M" for adult male; "F" for adult female and "C" for child – represent different average passenger weights. When Erna checked in with her two young daughters, the airline should have recorded them as "C,C,F," an adult female and two children traveling together. Instead, the manifest miscoded these passengers as "M,F,C," indicating a man and woman traveling with one child. Such misidentification would prevent airline security or law enforcement officials from using the quickest way to locate a woman kidnapping two children in violation of law, as confirmed by Ellerup's trial testimony. *Id.* at 6a-7a.

The behavior of Icelandair executives and employees after the May 1, 1992, incident added credibility to the inference that Icelandair had knowingly participated in Erna's illegal venture. The President of Icelandair and its chief executive in the United States both gave press interviews following the filing of the complaint in this case, falsely stating that Erna and the girls had "traveled with valid tickets and passports, and therefore, were not treated any differently from other Icelandair passengers." In addition, a flight attendant aboard Flight 614 admitted to a different reporter that Icelandair has helped to "smuggle" the girls out of the country, but that testimony was excluded at trial. *Id.* at 25a-26a.

3. Petitioners' Lawsuit Results in a $15 Million Verdict.

Following extensive but unsuccessful efforts to retrieve his daughter from Iceland, petitioner Pittman sought damages from Icelandair for the harm suffered by virtue of its tortious conduct. Petitioner filed a complaint for himself and on behalf of his daughter in the New York courts.[1] Icelandair removed the action to Federal court.

The judge instructed the jury that, in order to find Icelandair liable for interference with parental rights, intentional infliction of emotional distress and false imprisonment, it must find "that Mr. Pittman's ex-wife illegally removed his daughter to Iceland from the United States and that the defendant Icelandair wrongfully assisted her in engaging in this unlawful activity" (Trial Transcript at 349), and that "a reasonable person in the circumstances known to Icelandair would have believed that he was aiding and assisting in the violation of a court order in transporting Elizabeth." (*Id.* at 351.) The jury found Icelandair liable and awarded $10 million in compensatory damages to both plaintiffs and $5 million in punitive damages. *Id.* at 9a-10a.

4. The District Judge Grants a New Trial and Judgment for Icelandair as a Matter of Law.

Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, Icelandair moved orally for judgment as a matter of law before the case went to the jury. *Id.* at 8a. Icelandair renewed its motion for judgment as a matter of law after the verdict, to which the judge responded (Trial Transcript at 374-75):

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[1] The complaint also named Erna, her step-father and Mr. Hilmarsson as defendants, but since none was in the United States, the trial proceeded solely against Icelandair. Pet. App. B, p. 30a, *infra*.

There is evidence, at least, that the airline was put on notice of a court order. If that had been all there was to it, you would be home free. I think the problem here is, when you couple that with all of the name changes in the reservation and couple that with the fact that I think a reasonable juror could conclude that your witness, Mr. Ellerup, lied about his involvement in processing these people and where those records indicate that all of the people that boarded the plane, the supervisor takes care of only these four and then he lies about it, that gives rise to an inference that he knew that there was something wrong with what he did.

And therefore the issue really comes down to, since there was a court order prohibiting her from leaving, is it reasonable to infer that what he did was wrong, that she was under court order that prohibited her from bringing her out of the country, which information he could have gotten either because someone heard that from Mr. Grayson and communicated it to others in Icelandair or because Erna or her father told the airline.

I think there is a reasonable basis for a jury to conclude that the airline is covering up something. And if they are covering up something – there is no other explanation.

The district judge later, in writing, changed his opinion and concluded that he had erroneously instructed the jury that Icelandair had a duty to refuse transport to Erna even if the airline had actual knowledge of the court order prohibiting her from leaving the jurisdiction. Reasoning that airlines are "common carriers" that "as a general rule" are "bound to receive for carriage, without discrimination, all proper persons who desire and properly offer to become

passengers," the district judge held that Icelandair could not lawfully have refused to transport Erna and her daughters. Pet. App. B, p. 33a, *infra*. He concluded that in light of Icelandair's legal obligation to transport paying passengers, there was insufficient evidence that it had conspired to deprive petitioners of their parent-child relationship. *Id.* at 38a-40a.

5. The Second Circuit Agrees That Icelandair Was Legally Obligated To Transport Passengers Notwithstanding the Use of Demonstrably False Identities.

Agreeing with the trial court that "there was ample evidence from which a jury could reasonably infer that Icelandair knew Erna sought to leave the country surreptitiously and that it intentionally assisted her in doing so" (Pet. App. A, p. 23a, *infra*), the Court of Appeals for the Second Circuit affirmed. It discussed, but did not resolve, the question whether New York tort law imposed liability for interference with parental rights on the ground that Icelandair had a "general duty to receive and transport persons who offered themselves as paying passengers," which applied in the circumstances of this case. *Id.* at 25a. The court of appeals cited no authority for the source of this "general duty." It then relied on the proposition that an airline has no "duty" to refuse to transport a passenger using an assumed name in rejecting petitioners' argument that their negligence claim had been wrongfully withheld from the jury. *Id.* at 28a.

REASONS FOR GRANTING THE WRIT

Both courts exonerated Icelandair notwithstanding overwhelming evidence that it had knowingly participated in the abduction of petitioner's daughter. They did so based on their conclusion that an airline is *required* by law to transport a paying passenger even if the name on his ticket does not match the name on his passport or other identification and

even if there are other indications that a surreptitious and possibly illegal departure from the United States is being attempted. This novel and remarkable doctrine of law – used in this case to upset a substantial jury verdict in favor of a father and daughter who, in violation of explicit court orders, have been illegally cut off from any contact with each other – is directly contrary to federal aviation law, which negates any such duty. The ruling below also significantly endangers international air travel and facilitates parental abductions in violation of federal law and international treaties.

1. *The "general duty" invoked by the courts below does not exist.* The court of appeals did not cite any authority for the remarkable proposition that led it to vacate the jury award.[2] In fact, airlines are not required to transport each and every person who has a reservation and a presents a pre-paid ticket for travel. The common law recognizes that common

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[2] The district court did cite two cases purportedly supporting the contention that an airline, as a common carrier, has a duty to transport a passenger under the circumstances present in this case. Pet. App. B, p. 33a, *infra*, (citing *Semon v. Royal Indemnity Company*, 179 F. Supp. 403 (W.D. La. 1959), and *American Trucking Associations, Inc. v. Atchison, Topeka and Santa Fe Railway Co., et al.*, 387 U.S. 397 (1967)). Neither supports the "general duty" invented by the courts below. In *Semon*, the survivors of a man who drowned when he fell from a chartered boat sued for benefits under a policy of accident insurance issued to the decedent. 179 F. Supp. at 403. The entitlement benefits depended upon whether the boat was a "common carrier" under the policy. The court referred to several sources for the definition of a common carrier, most of which centered upon a carrier's "duty to serve all without discrimination" or, in other words "to receive all who apply for passage, so long as there is room and *no legal excuse for refusing*." *Id.* at 405 (emphasis added). The decision in *American Trucking Associations* interpreted the authority of the Interstate Commerce Commission to promulgate rules concerning the non-discriminatory duty of "piggyback" service in the carriage of goods to truckers. The court discussed the "common law obligations of railroads as common carriers," as codified in the Interstate Commerce Act, *id.* at 406, noting that the "refusal to carry the goods of some shippers was unlawful." *Id.* Nothing in either opinion supports the broad duty of transport imposed on airlines in this case.

carriers may refuse to transport passengers in many situations, including when the passenger is a fugitive from justice, *Chicago R.I. & P.R. Co. v. Armstrong*, 30 Okla. 134, 120 P. 952, 955 (1911) ("[i]t would not be obliged to carry one . . . fleeing from justice"); *Grannan v. Westchester Racing Association*, 16 A.D. 8, 16, 44 N.Y.S. 790 (App. Div. 1897), *rev'd on other grounds* 153 N.Y. 449, 47 N.E. 896 (1897) ("it is the absolute right of a carrier to refuse to receive for carriage a fugitive from justice"), when he fails to comply with the carrier's reasonable rules and regulations, *State ex rel. Atwater v. Delaware L & W R.. Co.*, 48 N.J.L. 55, 2 A. 803 (N.J. 1886), or when he presents a danger to the safety or convenience of other passengers. *Owens v. Macon & B.R. Co.*, 119 Ga. 230, 46 S.E. 87, 88 (Ga. 1903) ("The payment of fare and the possession of a ticket do not require the carrier to transport those who are noisy or boisterous, or who threaten the safety of, or occasion inconvenience to, others on the train.").

Congress has codified an airline's right to refuse transport in legislation permitting airlines to decline transport to persons whose passage, in the airline's broad discretion, would be inimical to the public safety. *See generally* 49 U.S.C. § 44902(b) (a "foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety"). Federal courts have made clear that an airline has "*broad discretion* with respect to who[] will be granted or denied passage." *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989) (emphasis added). *See also Zervigon v. Piedmont Aviation, Inc.*, 558 F. Supp. 1305, 1308 (S.D.N.Y.), *aff'd without op.* 742 F.2d 1433 (2d Cir. 1983).

In interpreting the airlines' range of discretion, several circuits have held that federal law and policy requires that airlines have authority, unfettered by state law, to refuse to board passengers who present false identification or no identification at all. In *Smith v. Comair, Inc.*, 134 F.3d 254

(4th Cir. 1998), a passenger boarded the first leg of a flight from Roanoke, Virginia, to Minneapolis without presenting any identification. When he attempted to board the second leg without identification, airline officials refused to transport him to his final destination. *Id.* at 256. The passenger filed a state law tort suit against the airline, which the court held was preempted by 49 U.S.C. § 44902. *Id.* at 258-59. The court explained the important federal interests in preserving airline flexibility to refuse transport to passengers in such circumstances (*id.* at 258-59):

> Smith's contract claim must be held to be preempted under the [Airline Deregulation Act] because of its practical effect on federal law in this area. If passengers could challenge airlines' boarding procedures under general contract claims alleging failure to transport, we would allow the fifty states to regulate an area of unique federal concern—airlines' boarding practices. Pursuant to 49 U.S.C. § 44902(b), airlines must be accorded broad discretion in making boarding decisions related to safety. Allowing Smith's claim to proceed would frustrate this important federal objective. Airlines might hesitate to refuse passage in cases of potential danger for fear of state law contract actions claiming refusal to transport.

Similarly, in *Williams v. TransWorld Airlines*, 509 F.2d 942, 945 (2d Cir. 1975), TWA refused to transport a passenger intending to travel from Tanzania to Detroit Michigan. The passenger's ticket bore the name "R. Franklin" but his passport bore his true name "Robert Franklin Williams." *Id.* 944 & n. 4. TWA had been informed by the Federal Bureau of Investigation that "there was a warrant outstanding from Williams' arrest [and] that he was a fugitive," *id.* at 944, although the FBI did not instruct the airline to refuse passage. The court of appeals upheld the

airline's unilateral decision refusing to transport Williams as reasonable under the circumstances, emphasizing that Section 44902 "expressly leaves the ascertainment of the necessity for denying passage to one seeking it, to the 'opinion of the air carrier' within the terms of the statute." *Id.* at 948.

The decision of the Second Circuit, recognizing a duty to transport Erna and her daughters under false names, ignores and supersedes the discretion and flexibility afforded to airlines by 49 U.S.C. § 44902, as interpreted by several federal courts of appeals. By overstating the obligations of common carriers generally to transport paying passengers, the Second Circuit has undermined the ability of individual airlines to deny passage to persons who, in the reasonable view of the airlines, present a risk of safety or who are traveling in violation of law. Fearing civil liability to passengers who may sue them for violation of this "general duty," airlines will fail to take prudent security precautions when presented with passengers demanding to travel under false names.

2. *Federal law requires airlines to reject passengers traveling under false names.* The duty imposed on airlines by the Second Circuit in fact conflicts with a squarely contrary duty under federal regulations. By federal law, airlines are required to collect the following information to record in a passenger manifest: "the full name of each passenger" and "the passport number of each passenger." 49 U.S.C. § 44908. In regulations promulgated pursuant to this provision, the federal government has ordered covered airlines (of which Icelandair is one) to "collect, or cause to be collected, the full name of each passenger who is a U.S. citizen." The regulation explicitly directs that "U.S. citizen passengers for whom this information is not obtained *shall not be boarded.*" 14 C.F.R. § 243.7 (emphasis added).

There is no dispute in this case that the names collected by the airline from Erna and her daughters, as recorded in the

passenger manifest, were not the "full names" of the girls, as that term is defined by federal law. *See* 14 C.F.R. § 243.3. Having presented two different false names for each of the U.S. citizen passengers traveling with her, Erna had no entitlement to the transport of those passengers pursuant to the "contracts" of carriage, *i.e.*, their tickets. To the contrary, Icelandair's failure to collect and record the full names of the two U.S. citizen children imposed on it a duty under federal law *not* to transport them.

The Second Circuit's decision unsettles the obligations of commercial airlines in the State of New York. Airlines will now feel compelled to transport passengers who produce tickets for travel with demonstrably false identities, simply in order to avoid liability pursuant to this newly identified duty. And, by signaling that no civil liability will attach to an airline whose employees assist a mother in removing her children from the country through knowing use of a false identity, the Second Circuit has created an enormous disincentive for an airline to ask questions that would confirm or deny whether a suspicious passenger is, indeed, traveling in violation of judicial orders.

Moreover, if airlines take seriously the "general duty" prescribed by the Second Circuit, it will endanger the traveling public and encourage violations of law. Persons who travel under aliases more likely than not are attempting to escape the consequences of past illegal behavior, or are headed toward future illegal behavior. By subjecting airlines to uncertain consequences for failing to transport persons whose identification papers are suspicious, the decision below ensures that airlines will, freely and without adverse consequence to themselves, assist wrongdoers in confounding efforts to bring them to justice.

3. The legal issue is important to the enforcement of the federal statute and treaty protecting American parents against the unlawful abduction of their children by foreign-citizen parents. Aside from the tremendous personal importance of this lawsuit to the petitioners, the issue presented in this case is of much larger general significance. Congress has reacted to the growing problem of parental abduction of children, both on its own and in conjunction with other nations, by taking measures to deter the international transportation of children when such transportation impairs parental rights. The decision of the Second Circuit undermines the deterrent effect of these federal and international initiatives.

In 1988, the United States ratified the Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980), which is based on the principle "that the interest[s] of children are of paramount importance in matters relating to their custody," and on the "desir[e] to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." After realizing that voluntary civil enforcement mechanisms for the return of unlawfully abducted children often failed in their aims, *see International Child Abduction: Hearing Before the Subcomms. on Human Rights and Int'l Orgs. and on Int'l* Operations, 100th Cong. 2d Sess. at 62-63 (1988) (statement of Congressman Schumer), Congress went on to pass the International Parental Kidnapping Crime Act of 1993, codified at 18 U.S.C. § 1204. That act makes it a felony to "remove[] a child from the United States . . . with the intent to obstruct the lawful exercise of parental rights." As with the Hague Convention, the purpose of the statute is "to deter the removal of children from the United States to foreign countries in order to obstruct parental rights." H. Rep. No. 103-390 at 1 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2419, 2419.

Sadly, international kidnapping of children in derogation of the parent-child relationship is not a rare or isolated phenomenon. As marriages of Americans to foreign spouses have increased, the number of abductions of American children to foreign countries by foreign-born parents has grown alarmingly. Between 1975 and 1988, there were a total of 2600 international abductions by parents – an average of 200 per year. *See International Child Abduction Hearing* at 2. In 1992 alone, the State Department reported 515 such kidnappings.

Parental rights groups struggle to publicize the need for a stronger governmental enforcement mechanism to assist American parents in obtaining relief when they lose children at the hands of other parents who flee the reach of American family courts. The ease with which foreign-born parents have successfully abducted children and the difficulty American parents have in obtaining redress have led parents to feel that they may evade custody orders with impunity. By inventing a "general duty" to transport foreign parents traveling surreptitiously under false identities, the Second Circuit has increased the chances that the international abduction of children by foreign-born parents will succeed undetected by federal authorities. And by agreeing that the substantial jury verdict rendered against Icelandair should be vacated, the Second Circuit has closed off the most realistic avenue for redress available to a parent of an abducted child.

By effectively immunizing airlines from liability so long as they claim actual ignorance of the true circumstances behind highly suspicious behavior, the Second Circuit has cut off the last and best remedy for parents seeking to obtain relief for the grievous loss caused by the foreign abduction of their children. JFK Airport in New York City is the most popular hub for international travel from the United States. The law that governs JFK Airport effectively controls the international airline industry. Airlines are the principal source for international travel. The only participant in an

abduction from whom relief may be obtained once a parent has successfully removed a child from the jurisdiction of American courts is the airline that has participated in the abduction. When an airline has engaged in devious and egregious conduct designed to assist a parent in breaking the law – as the jury properly found in this case – it is wrong to invoke a "general duty" with no basis in law to prevent any recovery at all by the aggrieved parent from the only actor in the wrongful conduct who is present to face the consequences.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1999

APPENDIX A

ELIZABETH PITTMAN, a minor under 18 years of age by Frederick Pittman her father and legal custodian and FREDERICK PITTMAN, individually, Plaintiffs-Appellants,

v.

ERNA (ETTA) PITTMAN GRAYSON, a/k/a Erna Eyjolfsdottir, HELGI HILMARSSON, and GUDMUNDUR KARL JONSSON, Defendants, ICELANDAIR, INC., Defendant-Appellee.

Docket No. 97-9066

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

149 F.3d 111; 1998 U.S. App. LEXIS 13642

June 26, 1998, Decided

HOWARD A. WINTNER, New York, New York (Robert K. Erlanger, New York, New York, on the brief), for Plaintiffs-Appellants.

JOHN F. SCHUTTY III, New York, New York (Desmond T. Barry, Jr., Susan S. Kang, Condon & Forsyth, New York, New York, on the brief), for Defendant-Appellee.

Before: KEARSE and JACOBS, Circuit Judges, and MISHLER, District Judge*.

KEARSE, Circuit Judge:

Plaintiffs Elizabeth Pittman ("Elizabeth"), by her father and legal custodian Frederick Pittman ("Frederick"), and Frederick individually appeal from a judgment entered in the United States District Court for the Southern District of New York, John S. Martin, Jr., Judge, setting aside a $15 million jury verdict in their favor against defendant Icelandair, Inc. ("Icelandair"), for its participation in the removal of Elizabeth from the United States by defendant Erna Pittman Grayson a/k/a Erna Eyjolfsdottir ("Erna"), who is Elizabeth's mother and Frederick's ex-wife, in violation of a court order and of Frederick's right to joint custody. The district court granted judgment as a matter of law in favor of Icelandair on the ground that the trial evidence was inadequate to permit a reasonable inference that Icelandair had sufficient notice to allow it to be held liable as a coconspirator or an aider and abettor. On appeal, plaintiffs seek reinstatement of the jury verdict; they also contend that, even if the evidence they introduced was insufficient, judgment against them as a matter of law was improper because of erroneous trial rulings against them. Icelandair contends that judgment in its favor as a matter of law was appropriate, and, alternatively, that it is entitled to a new trial because of errors in the district court's instructions to the jury. For the reasons that follow, we affirm.

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* Honorable Jacob Mishler, of the United States District Court for the Eastern District of New York, sitting by designation.

I. BACKGROUND

The facts stipulated by the parties and the evidence at trial, taken in the light most favorable to plaintiffs as the parties against whom judgment as a matter of law was granted, revealed the following.

A. The State Court Orders Regarding Elizabeth

Erna, a citizen of Iceland, and Frederick were married for five years. Following their divorce in 1986, they had joint legal custody of their then-four-year-old daughter, Elizabeth. Elizabeth lived with Erna, but Frederick saw her frequently. Erna then married Brian Grayson ("Grayson"), with whom she had a daughter, Anna Nicole Grayson ("Anna"), born in 1987. Erna, Grayson, Anna, and Elizabeth lived together in northwest Florida. In 1991, Grayson sought a divorce from Erna and requested sole custody of Anna. At about the same time, Frederick brought a proceeding in Okaloosa County, Florida, seeking sole custody of Elizabeth.

In Frederick's custody proceeding, the Okaloosa court on October 28, 1991, issued a temporary injunction prohibiting Erna from removing Elizabeth from the territory encompassed by the First Judicial Circuit of Florida. On May 4, 1992, Frederick was awarded sole custody of Elizabeth.

In the meantime, Grayson had obtained a court order, similarly prohibiting Erna from removing Anna from northwest Florida. In addition, fearing that Erna might flee to Iceland before the custody proceedings were resolved, Grayson arranged to have the passports of Erna, Anna, and Elizabeth impounded by the court.

B. Erna's May 1, 1992 Removal of Elizabeth from the United States

During the pendency of the custody proceedings, notwithstanding the orders not to remove her daughters from northwest Florida, Erna made preparations to take the girls to Iceland. In March 1992, she obtained provisional passports at the Icelandic Consulate in Tallahassee, Florida, to replace those impounded by the court. The Icelandic provisional passports were issued in the names "Erna Eyjolfsdottir," "Elizabeth Jeanne Pittman," and "Anna Nicole Grayson."

In early April, Erna's then-boyfriend, defendant Helgi Hilmarsson, made an airline reservation for himself, through an Icelandair sales agent in New York, to fly on May 2, 1992, from Florida to John F. Kennedy Airport ("JFK Airport") in New York, and from there on Icelandair Flight 614 to Keflavik Airport in Iceland. On April 10, reservations for the same flights were made through an Icelandair sales agent in Iceland for three additional passengers, under the names Ms. S. Hilmarsson, Child "A" Hilmarsson, and Child "B" Hilmarsson. The Icelandair tickets corresponding to these three reservations were paid for in Iceland on April 18 by credit card registered to defendant Gudmundur Karl Jonsson, Erna's stepfather.

During the weekend of April 17-19, Grayson became aware that Erna, Anna, and Elizabeth had disappeared. Suspecting that Erna would attempt to return to Iceland with the girls, Grayson alerted Frederick and undertook to prevent Erna from leaving the country. On Monday April 20, Grayson telephoned the Baltimore-Washington and Orlando, Florida offices of Icelandair. He spoke with Icelandair representatives (whom he could not identify by name or title at trial), told them of his fear that Erna would attempt to leave the country, and told them there was a court order

prohibiting Erna from taking the girls out of northwest Florida. Grayson asked whether Icelandair had reservations under the names "Erna Eyjolfsdottir or Pittman or Grayson or Etta or Ron Matlack, Elizabeth Jeanne[ ]Pittman or Anna Nicole Grayson," and was told that Icelandair did not have a reservation under any of those names. (Trial Transcript ("Tr.") 44.) In an effort to enlist the airline's aid in stopping Erna from leaving the country, Grayson gave the employees with whom he spoke physical descriptions of Erna, Anna, and Elizabeth, and said that Erna and the girls would probably be traveling under false names. Grayson testified that this was the substance of his conversation with both the Baltimore-Washington and Orlando offices of Icelandair.

On April 24, four days after Grayson's calls to Icelandair, the "Hilmarsson" May 2 reservations were altered in several respects. The passengers' names were changed from "Hilmarsson" to "Karlsson"; the flights between Florida and New York were cancelled; and the departure date from JFK Airport to Keflavik was advanced to May 1. On May 1, Erna, Hilmarsson, Anna, and Elizabeth arrived at JFK Airport, checked in under the name "Karlsson", and flew to Iceland on Flight 614. Elizabeth, who was then 10 years old, has remained in Iceland; Frederick has not seen his daughter since.

In 1993, Frederick, on behalf of himself and as the legal representative of Elizabeth, commenced the present action in New York state court against Erna, Icelandair, Hilmarsson, and Jonsson, alleging that they had conspired to remove Elizabeth from the United States in violation of Frederick's custody rights. Icelandair removed the action to federal court on the basis of diversity jurisdiction. The individual defendants failed to answer or otherwise appear, and plaintiffs proceeded against Icelandair, asserting claims of intentional interference with parental custody, intentional

infliction of emotional distress, false imprisonment, and negligence.

C. Irregularities in Icelandair's Transport of Erna and the Girls

In addition to evidence of the above events, plaintiffs presented evidence of airline irregularities in Erna's check-in and departure on the May 1st Flight 614. First, although the names on the reservations had been changed to "Karlsson" on April 24, the tickets were nontransferable, and new tickets were not issued in the name "Karlsson"; the names on the tickets remained "Hilmarsson." Thus, Erna and the girls were allowed to check in for and depart on Flight 614 despite the fact that there were no reservations in the names shown on their tickets. Further, the provisional passports then possessed by Erna and the girls showed their true names, "Erna Eyjolfsdottir," "Elizabeth Jeanne Pittman," and "Anna Nicole Grayson." Notwithstanding a provision in Icelandair's customer service manual instructing employees checking in passengers to "compare name in passport to name on ticket," Erna and the girls were allowed to travel on Flight 614 despite the fact that the names on their passports matched neither the "Hilmarsson" names on their tickets nor the "Karlsson" names on their reservations.

Further, the Icelandair passenger manifest for the May 1st Flight 614 was falsified to conceal the presence of Erna and her daughters. Icelandair assigns a "weight and balance" code to each passenger as part of its check-in process. Those codes--"M" for male, "F" for female, "C" for child--represent different average passenger weights and are important for weighting and balancing the aircraft. Olav Ellerup, Icelandair's senior passenger supervisor at JFK Airport, testified that if one were searching for a woman traveling alone with two children, examination of the weight-and-

balance column on the passenger manifest would be the quickest way to locate such a group. On the manifest for the May 1st Flight 614, however, though Helgi Hilmarsson (traveling as a "Karlsson") was properly coded "M," the three female "Karlsson" passengers were not coded "F, C, C," which would have signified a woman traveling with two children, but rather were coded as "M, F, C," indicating a man and a woman traveling with one child.

Ellerup was the employee whose initials appeared on the Flight 614 passenger manifest next to the entries for the "Karlsson" passengers, indicating that he checked them in, in disregard of the discrepancies among the names on the reservations, tickets, and passports, and made the false designations of gender and adulthood on the manifest. Ellerup testified at trial that checking in passengers was not a normal part of his duties and that he had not checked in any passengers on May 1. He surmised that he had forgotten to log off the airline's computer system and that someone else had checked in passengers under his initials. Icelandair had admitted, however, that Ellerup "ha[d] checked-in thousands of passengers as a check-in supervisor." (Icelandair Trial Memorandum at 6.) Further, it had stipulated that "Ellerup was responsible for ensuring that the 'Karlssons' held reservations and passenger tickets for Icelandair Flight 614 on May 1, 1992," and that on that day they "were checked-in for Flight 614 at JFK by . . . Ellerup." (*Id.* at 5).

Plaintiffs also presented evidence that Jonsson, Erna's stepfather who paid for the tickets for Erna and the girls, was chief of the duty-free store at Keflavik Airport and was known to Icelandair executives, including its vice president for operations in the Americas. Further, according to a witness who was a passenger on an Icelandair flight with Erna and Elizabeth in 1993, the year after Elizabeth's removal to Iceland, Icelandair gave Erna and Elizabeth

highly preferential treatment, "practically fawning over" them, which a flight attendant told the witness was because the Icelandair employees knew Jonsson, Elizabeth's grandfather.

D. The Jury's Verdict; Judgment as a Matter of Law

When plaintiffs had completed presentation of their case but for the testimony of one expert witness, Icelandair moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure on the ground that there was insufficient evidence that Icelandair had received notice of the court-ordered restrictions on Erna's travel with Elizabeth:

> The issue that is in dispute . . . is whether Icelandair was on notice of the fact that Mrs. Pittman was not allowed to leave the United States with her daughter.
>
> And there has been no evidence presented, other than Mr. Grayson's statement that he made a telephone call to Icelandair in April of 1992, advising that there were some restrictions on his ex-wife's travel plans.
>
> . . . .
>
> . . . I submit that that issue should not even go to the jury because there is no evidence to establish that my client was on notice of any travel restriction with respect to the ex-Mrs. Pittman that they should have acted upon.

(Tr. 266-67.) The court reserved decision, stating that there was "a substantial question here as to whether or not there was sufficient notice." (Tr. 267.) Icelandair attempted to

renew its motion at the close of all evidence, stating that it wished to reassert the points made in its trial memorandum, but the court cut off argument, saying that it would submit the case to the jury and hear argument on the motion while the jury was deliberating. (*See* Part II.A.1. below.)

In submitting the case to the jury, the district court effectively dismissed plaintiffs' negligence claim by refusing to give the jury an instruction on that cause of action. The court submitted the remaining claims of intentional interference with parental custody, intentional infliction of emotional distress, and false imprisonment to the jury; but believing that establishment of Icelandair's liability for its role in Erna's removal of Elizabeth from the United States required proof of the same core facts regardless of the legal theory, the court gave a single set of instructions with respect to liability:

> The question that you must decide is whether the plaintiff has proved by a preponderance of the evidence that the defendant Icelandair wrongfully aided Erna in transporting Elizabeth to Iceland.
>
> In order to find the defendant Icelandair liable for the damage suffered by Mr. Pittman and Elizabeth you must find that Icelandair knew that Erna Pittman had no right to take Elizabeth to Iceland and that by some wrongful act of its own aided or assisted her in removing the child from the United States.

(Tr. 349-50.)

The court gave the jury a verdict form containing the single liability question, "Do you find that plaintiffs have established their claims against defendant Icelandair?" (Tr. 359.) The jury answered this question in the affirmative and

awarded plaintiffs a total of $15 million. It awarded Frederick $7.5 million in compensatory damages plus $2.5 million in punitive damages and awarded Elizabeth $2.5 million in compensatory damages plus $2.5 million in punitive damages.

After the verdict was returned, Icelandair again moved for judgment as a matter of law, renewing its contention that there was insufficient evidence to support plaintiffs' claims. In addition, Icelandair argued that the claims for interference with custodial rights should be dismissed as a matter of law (a) because that cause of action had not been recognized as viable under New York law, (b) because on May 1, 1992, Erna had joint custody of Elizabeth, and (c) because even if such a claim were cognizable, Elizabeth had no standing to assert it. Icelandair moved alternatively for a new trial, contending that the trial court had made errors in evidentiary rulings and in instructing the jury.

In a Memorandum Opinion and Order dated July 2, 1997 ("Opinion"), the district court granted Icelandair's motion for judgment as a matter of law. The court found that while there was sufficient evidence to establish that Icelandair, through its agent Ellerup, had knowingly assisted Erna in her attempt to leave the country surreptitiously, the evidence was not sufficient to establish that Ellerup was aware that Erna's conduct violated Frederick's custody rights or a court order restricting her travel with Elizabeth. The court considered and rejected plaintiffs' argument that Grayson's telephone calls to Icelandair and the suspicious nature of Ellerup's own activities sufficed:

> The fact that Grayson had telephone conversations ten days earlier with Icelandair employees in Orlando and Baltimore in which he told them of the existence of a court order is not sufficient to establish that Ellerup

> was aware that Erna Pittman did not have the right to take her children to Iceland when he assisted them in the boarding process. There is no evidence that either of the two individuals with whom Grayson spoke passed on to Ellerup any of Grayson's statements and no reason in logic to assume that they did.
>
> While it was obvious to Ellerup that Erna Pittman wished to avoid detection by someone when she was leaving the United States, that fact does not provide a basis for concluding that he knew she was acting in derogation of her ex-husbands' custody rights.
>
> Erna Pittman's use of an assumed name in her travel plans is as consistent with the actions of a woman fleeing from an abusive and dangerous ex-husband as it is with an effort to deprive her ex-husband of his lawful custody rights. The desire for secrecy would be the same in both instances and, therefore, the use of assumed names cannot support an inference that Ellerup was on notice that Erna Pittman was engaged in wrongdoing.

Opinion at 10-11. The court also noted that while the jury might reasonably have concluded that Ellerup lied at trial, the fact that he gave false testimony was not sufficient to support an inference that he had been aware that Erna's taking Elizabeth to Iceland violated a valid court order.

The court also stated that its instructions as to Icelandair's duties had been flawed. In particular, the court noted that it had charged the jury that

> if an airline has actual notice that there is a court order prohibiting the parent from transporting the child to the place that is the plane's destination, it

> would be wrongful for the airline to transport the child.

Opinion at 4; Tr. 350. The court stated that this instruction was erroneous because Icelandair, as a common carrier, had a duty to transport anyone who sought passage and was not free to refuse to transport Erna and the girls simply because Grayson had informed it that there was a court order prohibiting Erna from removing the girls from Florida. Opinion at 5-6. Accordingly, the court stated that if the evidence were sufficient to permit the imposition of liability on Icelandair, it would grant Icelandair's alternative motion for a new trial; but that relief was mooted by the granting of judgment as a matter of law.

There having been no final adjudication of the claims against the defaulting individual defendants, the court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing plaintiffs' claims against Icelandair. This appeal followed.

II.
DISCUSSION

On appeal, plaintiffs contend principally that they are entitled to have judgment entered on the jury's verdict in their favor, arguing that the district court erred (1) in finding the evidence insufficient as a matter of law, and (2) in ruling, alternatively, that Icelandair was entitled to a new trial because of an error in the court's instructions. Plaintiffs further contend that if the evidence was insufficient to support their verdict, they are entitled to a new trial because the court (a) erroneously excluded relevant evidence that would have supported their claims for interference with parental custody and (b) erroneously refused to submit to the

jury their claims for negligence. We conclude that Icelandair was entitled to judgment as a matter of law.

A. Judgment as a Matter of Law

Preliminarily, we note that three claims were submitted to the jury, to wit, interference with parental custody, intentional infliction of emotional distress, and false imprisonment, and that the verdict form inappropriately did not ask the jury to specify which of the claims it found established. *See Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d 276, 285-86 (2d Cir. 1998) (jury instructions should give guidance as to the elements of each claim submitted, and "when more than one claim is submitted to the jury, the trial court should foreclose the possibility of an ambiguous verdict by requiring the jury to specify its liability finding as to each claim"). On this appeal, however, plaintiffs have made no argument addressed to the claims of intentional infliction of emotional distress or false imprisonment. Accordingly, insofar as judgment as a matter of law is concerned, we need deal only with the sufficiency of the evidence to support the claim that Icelandair aided and abetted or conspired with Erna in interfering with parental custody.

In challenging the granting of judgment as a matter of law, plaintiffs contend principally that no proper preverdict motion was made pursuant to Rule 50(a) and that, in any event, the evidence was sufficient. Icelandair, in support of judgment as a matter of law, argues not only that the evidence of notice was insufficient to establish its liability as an aider and abetter or coconspirator ("concerted-action liability"), but also that Erna's underlying conduct did not constitute an actionable tort under the law of New York--whose substantive law the parties have assumed is applicable--and hence could not provide a foundation for

concerted-action liability. For the reasons discussed below, although the timing as to some of the legal arguments was less than ideal, we reject plaintiffs' procedural challenge. As to the merits, we conclude that we need not decide whether the New York courts would recognize a tort of interference with parental custody in the present circumstances, for even if such a tort were recognized, there was inadequate evidence in this case to establish concerted-action liability on the part of Icelandair.

1. Procedures Under Rule 50

It is well established that a party is not entitled to challenge on appeal the sufficiency of the evidence to support the jury's verdict on a given issue unless it has timely moved in the district court for judgment as a matter of law on that issue. *See, e.g., Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d at 286-87. The motion "must at least identify the specific element that the defendant contends is insufficiently supported." *Id.* at 286. A generalized challenge is inadequate. *See, e.g., Cruz v. Local Union No. 3 of the International Brotherhood of Electrical Workers*, 34 F.3d 1148, 1155 (2d Cir. 1994); *Lambert v. Genesee Hospital*, 10 F.3d 46, 53-54 (2d Cir. 1993) ("the specificity requirement is obligatory"), *cert. denied*, 511 U.S. 1052, 128 L. Ed. 2d 339, 114 S. Ct. 1612 (1994).

In the present case, plaintiffs contend that Icelandair's Rule 50(a) motion at trial was inadequate because the specificity requirement was not met:

> [t]he only grounds [Icelandair's counsel] articulated was [*sic*]: (1) that there was no admissible evidence to support a jury verdict for "civil conspiracy, negligence, false imprisonment, and intentional infliction of emotional distress," and (2) "[t]here has

> been no proof of any form that Icelandair acted intentionally. . . " . . . .
>
> This is precisely the type of general objection that fails to preserve specific grounds on which to move for judgment as a matter of law under Rule 50(b).

(Plaintiffs' brief on appeal at 22-23 (citing Tr. 294-95, 368-0).) Insofar as the issue was the sufficiency of the evidence as to notice, we reject plaintiffs' procedural argument because the pages of the trial record on which plaintiffs rely do not include all of the relevant sufficiency challenges made by Icelandair. After all of plaintiffs' fact witnesses had testified at trial, counsel for Icelandair stated that the issue in dispute was "whether Icelandair was on notice of the fact that Mrs. Pittman was not allowed to leave the United States with her daughter" and argued that "that issue should not even go to the jury because there is no evidence to establish that my client was on notice of any travel restriction with respect to the ex-Mrs. Pittman that they should have acted upon." (Tr. 266-67.) It is thus clear that, as to the question of notice, the Rule 50(a) motion was sufficiently specific.

Insofar as Icelandair's contention is, instead, that Erna's underlying behavior did not constitute an actionable tort under New York law, we see no indication that that argument was made before the case was submitted to the jury. We note, however, that the district court may have prevented the presentation of that contention at trial by deciding to postpone complete argument on the Rule 50(a) motion until after the jury had begun its deliberations. (*See, e.g.*, Tr. 268 ("I will allow you to make an adequate record. I think what we will do is, we will take up this argument while the jury is deliberating."); Tr. 294 ("Let me stop you because again I think I am going to reserve and submit the case to the jury, and I will hear you on this motion . . . while the jury is

deliberating.") To the extent that Icelandair sought to argue the sufficiency of the evidence to support an element of any of plaintiffs' claims, the postponement was inappropriate. Rule 50(a) requires that, to be timely, the motion for judgment as a matter of law must be made "before submission of the case to the jury." Fed. R. Civ. P. 50(a)(2). The purpose of this timing requirement is "to give the claimant a fair opportunity to cure" any overlooked deficiencies in his proof. *Piesco v. Koch*, 12 F.3d 332, 340 (2d Cir. 1993) (internal quotation marks omitted); *see, e.g., Baskin v. Hawley*, 807 F.2d 1120, 1134 (2d Cir. 1986); Fed. R. Civ. P. 50 Advisory Committee Note (1991). That purpose may well be thwarted if the district court does not permit the motion to be argued until the jury has begun deliberations.

It is hardly clear in the present case, however, that either party was prejudiced by the delay in argument. As discussed above, Icelandair had timely argued that there was insufficient evidence of notice to permit the imposition of concerted-action liability on it, thereby giving plaintiffs an adequate opportunity to present additional evidence if such evidence existed. Further, although it is possible that Icelandair would have added an argument, had time been allowed, that Erna's underlying behavior did not constitute an actionable tort under New York law, the record contains several indications that Icelandair would not in fact have done so. First, in seeking to be heard on the Rule 50(a) motion prior to the submission of the case to the jury, Icelandair's counsel stated that "[t]he elements of my motion are set forth in the trial memorandum filed by Icelandair in this case" (Tr. 293); that memorandum, however, did not mention the contention that New York law does not recognize the underlying tort. Second, Icelandair had stipulated prior to trial that Erna "violated a custody order in violation of Mr. Pittman's custodial rights." (Transcript of

Hearing, January 29, 1997, at 3.) Third, although objecting to certain language in the court's proposed jury charge referring to Icelandair's own conduct, Icelandair endorsed the court's description of Erna herself as having "engaged in this unlawful activity" (Tr. 309). And finally, the court instructed the jury, in part, that

> [t]here is no dispute in this case that the action of Erna Pittman . . . in taking Elizabeth to Iceland was illegal and *violated the rights of both Mr. Pittman and his daughter* to have the daughter remain in the United States so that she could have such contact with her father as the courts of Florida deemed appropriate. *A person who has such rights may recover damages from any person who unlawfully takes or withholds the child.*
>
> Thus, *if Erna Pittman was the defendant on trial here she would be liable to both Mr. Pittman and Elizabeth for the damages they suffered as a result of Elizabeth being taken to Iceland.*

(Tr. 349 (emphasis added).) So far as we are aware, Icelandair did not object. Thus, we cannot conclude that the court's curtailment of timely oral argument on the Rule 50(a) motion at trial prevented Icelandair from airing its present contention that Erna's conduct is as a matter of law not recognized as a tort.

Nonetheless, the contention here that New York law does not recognize Erna's proven conduct as a tort is a purely legal argument, rather than a sufficiency challenge that, if timely asserted, could potentially be met by the presentation of additional evidence; and that contention was, eventually, made to the district court in Icelandair's posttrial memoranda. Accordingly, we reject plaintiffs' contention that Icelandair's

present arguments in support of judgment as a matter of law have not been properly preserved.

2. New York Law as to Interference with Parental Custody

Notwithstanding the trial court's unobjected-to instruction that "if Erna Pittman was the defendant on trial here she would be liable to both Mr. Pittman and Elizabeth for the damages they suffered as a result of Elizabeth being taken to Iceland" (Tr. 349), the existence and contours of a tort cause of action for interference with parental custody under New York law are far from clear. As we recently noted, "New York has very few cases dealing with this tort or related torts in this context." *Minot v. Eckardt-Minot*, 13 F.3d 590, 594 (2d Cir. 1994). The question raised here by Icelandair is whether New York law recognizes, on behalf of either parent or child, a claim for damages for interference with parental custody on account of the removal of the child from the jurisdiction in violation of a court order where the removing parent, at the time of the removal, had joint custody. New York law has not provided a definitive answer.

New York cases, including one decided since *Minot*, have indicated that in some circumstances there is recognized a tort of intentional interference with parental custody. *See, e.g., Johnson v. Jamaica Hospital*, 62 N.Y.2d 523, 531, 478 N.Y.S.2d 838, 842, 467 N.E.2d 502 (1984) (ruling that parents had no cause of action against a hospital for negligence in permitting child's abduction from its nursery, but distinguishing, *obiter*, cases involving "intentional torts such as . . . *willful disobedience of a court custody order*" (emphasis added)); *Casivant v. Greene County Community Action Agency, Inc.*, 234 A.D.2d 818, 819, 652 N.Y.S.2d 115, 117 (3d Dep't 1996) (mem.), *aff'd*, 90 N.Y.2d 969, 665 N.Y.S.2d 952, 688 N.E.2d 1034 (1997);

Harley v. Harley, 170 A.D.2d 779, 781, 565 N.Y.S.2d 625, 627 (3d Dep't 1991) (mem.) ("The tort of interference with custody is not unheard of . . . .") (citing, *e.g.*, *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 19 (E.D.N.Y. 1978)), *appeal dismissed*, 79 N.Y.2d 1035, 584 N.Y.S.2d 441 (1992). Further, some courts have indicated that a noncustodial parent who has visitation rights has a cognizable claim against the custodial parent for removal of a child from the jurisdiction in violation of the court order permitting visitation, see, e.g., *McGrady v. Rosenbaum*, 62 Misc. 2d 182, 188, 308 N.Y.S.2d 181, 188 (Sup. Ct. N.Y. County 1970), *aff'd*, 37 A.D.2d 917, 324 N.Y.S.2d 876 (1st Dep't 1971), although they have stated that the remedies for such a violation do not include money damages, *see id.* ("remedy against a spouse who violates a court order respecting custody or visitation by removing the child from the state is by way of contempt or by precluding her standing to challenge the order or to enforce its support provisions, not by an action for damages"); *Friedman v. Friedman*, 79 Misc. 2d 646, 647, 361 N.Y.S.2d 108, 109-10, (Sup. Ct. Queens County 1974). On the other hand, New York courts have indicated that damages may be a proper remedy for a custodial parent who has a valid claim for intentional interference with her custodial rights in knowing violation of the custody order. *See, e.g.*, *Lisker v. City of New York*, 72 Misc. 2d 85, 89, 338 N.Y.S.2d 359, 364 (Sup. Ct. Queens County 1972) (refusing to dismiss complaint seeking damages against municipal Home for the "keeping [of] plaintiff's child without lawful justification and the delivery of the child to foster parents after the Home had been notified by the mother of her right to custody of the child"). That case, however, did not deal with a defendant parent who had joint custody.

In *Casivant v. Greene County Community Action Agency, Inc.*, 234 A.D.2d 818, 652 N.Y.S.2d 115 ("*Casivant*"), the

most recent pertinent state-court opinion of which we are aware, the Appellate Division stated that

> [t]he tort of intentional interference with a parent's custodial rights is rather narrow. As the Court of Appeals noted in *Johnson v. Jamaica Hosp.* (62 N.Y.2d 523, 478 N.Y.S.2d 838, 467 N.E.2d 502), cases upholding the existence of this tort have involved "violent abduction, willful disobedience of a court custody order, and wrongful detention" (*supra*, at 531).

234 A.D.2d at 819, 652 N.Y.S.2d at 117. The *Casivant* court dealt with a plaintiff father who alleged that a court order had given him sole custody of three children and that the defendants (who included the children's mother and an employee of a domestic- violence shelter) had knowingly violated that order. The court held that the defendants were entitled to summary judgment dismissing the complaint where (a) the father failed to produce, in response to the summary judgment motion, the court order that he claimed had given him sole custody, and (b) the defendants stated under oath that they did not know of an order awarding the father sole custody and believed instead that the mother and father had joint custody. The *Casivant* court's emphasis that defendants' "assumption that the parents shared custody of the children was certainly not unreasonable," *id.* at 820, 652 N.Y.S.2d at 117, may well indicate that custodial interference by or at the behest of a parent who had joint custody would not have been viewed as tortious. *See generally Restatement (Second) of Torts* § 700 comment *c* (1976) ("When the parents are by law jointly entitled to the custody . . . of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other."). Even so, however, *Casivant* would not necessarily resolve the actionability of Erna's conduct here, for *Casivant*

did not involve a court order expressly prohibiting one parent from removing the children from the court's jurisdiction. Nor did it purport to address the rights of the children themselves.

There is little authority as to the standing of a child, such as Elizabeth, to assert a claim of interference with custodial rights, but what little state authority we have found suggests that a child cannot maintain such an action. *See, e.g., Offenhartz v. Cohen,* 168 A.D.2d 268, 268, 562 N.Y.S.2d 500, 501 (1st Dep't 1990) (mem.) (indicating that child could not hold her custodial parent liable for abduction, and remarking that "cause of action for abduction belongs solely to a parent"); *Restatement (Second) of Torts* § 700 (one who interferes with a parent's right to custody "is subject to liability to the parent" (emphasis added)); cf. *Harley v. Druzba,* 148 Misc. 2d 564, 566-67, 560 N.Y.S.2d 959, 961 (Sup. Ct. Rensselaer County 1990) (dismissing sibling's claim for custodial interference where sibling had not been awarded custody, though refusing to dismiss her statute-based claim to visitation); *Whalen v. County of Fulton,* 941 F. Supp. 290, 299 (N.D.N.Y. 1996) (brother could not maintain an action for custodial interference) aff'd, *126 F.3d 400 (1997); but cf. Bennett v. Town of Riverhead,* 940 F. Supp. 481, 488-89 (E.D.N.Y. 1996) (parents have a constitutionally protected liberty interest against governmental interference with the custody of their children, and "this interest is reciprocal in that it belongs to the children as much as it does to parents").

In sum, the validity of Icelandair's contention that the New York courts would not recognize a cause of action in favor of either Frederick or Elizabeth for money damages against Erna, Elizabeth's joint custodian, for traveling with Elizabeth in violation of a court order, is unclear. We conclude, however, that we need not decide that question in this case, for Icelandair is sued as an aider and abetter or

coconspirator; and while it cannot be held liable on such a concerted-action theory if Erna herself has not committed a cognizable tort, *see, e.g.*, *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 295, 582 N.Y.S.2d 373, 375, 591 N.E.2d 222 (1992) ("It is essential that [*inter alia*] . . . one of the defendants committed an act in pursuance of the agreement which constitutes a tort . . . ."), it also cannot be held liable if any of the other elements of a concerted-action claim have not been established. Since, for the reasons discussed in the following section, we conclude that the notice element of concerted action was not established, we leave it to the "state . . . [to] lead the way in developing its law in this area, balancing the delicate issues involved." *Minot v. Eckardt-Minot*, 13 F.3d at 594.

3. Sufficiency of the Notice to Icelandair

Concerted-action liability under New York law is based on the principle that "[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer . . . are equally liable with him." *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580, 450 N.Y.S.2d 776, 780, 436 N.E.2d 182 (1982) (internal quotation marks omitted); *see, e.g.*, *Vanacore v. Teigue*, 243 A.D.2d 706, 664 N.Y.S.2d 604, 605 (2d Dep't 1997) (mem.). The elements of concerted-action liability are (1) an express or tacit agreement "to participate in a common plan or design to commit a tortious act," (2) tortious conduct by each defendant, and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort. *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d at 295, 582 N.Y.S.2d at 375 (internal quotation marks omitted). Conspiracy and aiding and abetting are varieties of concerted-action liability: conspiracy requires an agreement to commit a tortious act, *see, e.g.*, *Lindsay v.*

Lockwood, 163 Misc. 2d 228, 234, 625 N.Y.S.2d 393, 397 (Sup. Ct. Monroe County 1994); *Restatement (Second) of Torts* § 876(a), aiding and abetting requires that the defendant have given "'substantial assistance or encouragement'" to the primary wrongdoer, *Lindsay v. Lockwood*, 163 Misc. 2d at 232, 625 N.Y.S.2d at 396 (quoting *Restatement (Second) of Torts* § 876(b)). In order to be liable for acting in concert with the primary tortfeasor under either theory, the defendant must know the wrongful nature of the primary actor's conduct. *See, e.g., National Westminster Bank USA v. Weksel, 124 A.D.2d 144, 147, 511 N.Y.S.2d 626, 629* (1st Dep't) (neither conspiracy nor aiding-and-abetting liability is sustainable where there is no allegation that defendant knew of or intended to aid in the commission of a tort), *appeal denied*, 70 N.Y.2d 604, 519 N.Y.S.2d 1027 (1987).

In the present case, there was evidence that Icelandair, contrary to its own prescribed procedures, allowed Erna and the girls to fly using tickets issued in names different from the names on their reservations or on their passports; that it falsified the weight-and-balance codes to disguise the fact that the "Karlsson" party consisted of a woman and two children; that Jonsson had a relationship with Icelandair that predisposed its employees to do favors for him and his relatives; and that Ellerup lied at trial about his involvement in checking in Erna at JFK Airport. Thus, there was ample evidence from which the jury could reasonably infer that Icelandair knew Erna sought to leave the country surreptitiously and that it intentionally assisted her in doing so.

But, as the district court discussed, knowledge that conduct is clandestine does not necessarily include knowledge of its motivation or legality. Plaintiffs argue that Icelandair had the burden of producing evidence that its

subjective intent was other than to help Erna violate the court order, and that the district court, by hypothesizing that a woman might well be traveling surreptitiously in order to escape from an abusive husband, rather than to evade a court order, "invaded the exclusive province of the jury to select among competing, reasonable inferences" (Plaintiffs' brief on appeal at 18). Plaintiffs' arguments are wide of the mark, for the thrust of the district court's observation was that knowledge of the existence of a court order could not reasonably be inferred from suspicious circumstances alone. The question was whether the airline had been given adequate notice to cause it to know that Erna was committing a tort because her travel to Iceland with Elizabeth was prohibited by court order.

The only evidence in this case as to Icelandair's "knowledge" that there was a court order restricting Erna's travel with Elizabeth was Grayson's testimony describing his calls to the Baltimore-Washington and Orlando offices of Icelandair. Grayson told Icelandair employees, whose names he did not obtain and whose titles he did not know, of his fear that Erna would attempt to leave the country illegally, and told them there was a court order prohibiting Erna from taking the girls out of northwest Florida. More significant, however, is what Grayson did not do. He did not, for example, contact the airline's New York offices, where Icelandair's senior United States employees were located, or ask to speak with a high-ranking officer. He did not make any request of, or give any information to, Icelandair in writing. And he did not provide Icelandair with certified copies (or indeed any copies) of the court orders restricting Erna's travel with her daughters. Thus, crediting Grayson's testimony fully, the evidence as to Icelandair's knowledge was simply that two outlying Icelandair offices had received calls from a man whose identity was not documented (who, indeed, was not Pittman and could have been anyone), who

spoke to random employees, and who represented orally that Erna's travel with the girls was restricted by court orders as to whose existence and authenticity he provided no proof.

As the district court noted, Icelandair, as a common carrier, had a general duty to receive and transport persons who offered themselves as paying passengers. We reject the notion that the New York courts would consider that duty erased, and a contrary duty imposed, on the basis of mere oral representations such as those made here. Accordingly, regardless of whether the other elements of concerted-action liability are proven, and whatever authenticated type of notice the New York courts might ultimately require in order to impose such liability on a common carrier, we cannot infer that the state courts would find that the knowledge element of such a claim was established by Grayson's telephone calls.

B. The Exclusion of Alfredsdottir's Statement

Plaintiffs also contend that if we find the evidence insufficient we should remand for a new trial on the ground that the district court erred in not allowing them to introduce an out-of-court statement by Icelandair flight attendant Katrin Alfredsdottir. Alfredsdottir's statement was proffered through Rhonda Schwartz, a television news producer whose deposition testimony described a conversation she had with Alfredsdottir on an Icelandair flight in 1993 when Alfredsdottir observed her reading newspaper clippings about Erna and the girls. Schwartz testified that Alfredsdottir commented,

> "You know we helped sneak" -- snuck or smuggled, I really don't recall precisely -- "them out the back way or service entrance at Dulles Airport."

> And I asked her "Oh, were you involved in that? Do you know about this yourself?"
>
> And she said "No, no, this is just a story that I have heard," and then she left.

Icelandair admitted that Alfredsdottir was an Icelandair flight attendant on Schwartz's 1993 flight and was a member of the crew on the flight that took Erna and Elizabeth to Iceland on May 1, 1992, and plaintiffs contend that Alfredsdottir's statement was a vicarious admission that should have been deemed nonhearsay under Fed. R. Evid. 801(d)(2)(D). For several reasons we see no error in its exclusion.

First, since the Schwartz deposition testimony was that Alfredsdottir stated she was repeating a story she had heard from someone else, double-hearsay analysis is required. The first level of inquiry is whether Schwartz's testimony as to what Alfredsdottir said is hearsay, and plaintiffs' vicarious-admission theory deals only with that first level. Even if Schwartz's testimony were deemed nonhearsay on the theory that statements by Alfredsdottir were attributable to Icelandair, however, the content of Alfredsdottir's statement was itself hearsay because, as "'a story that I have heard,'" it purported to describe statements made to her by others. No basis having been shown for classifying the statement attributed to the unidentified source of Alfredsdottir's statement either as nonhearsay or as an exception to the hearsay rule, the statement attributed to Alfredsdottir was properly excludable on the ground that it contained hearsay. *See, e.g., Zaken v. Boerer*, 964 F.2d 1319, 1324 (2d Cir.), *cert. denied*, 506 U.S. 975, 121 L. Ed. 2d 375, 113 S. Ct. 467 (1992); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1002-03 (3d Cir. 1988).

Second, even if Alfredsdottir's statement neither was nor contained hearsay (and if by "'Dulles Airport'" she meant JFK Airport), its exclusion would provide no basis for a new trial, for it did not indicate that Icelandair knew that the reason for Erna's furtive flight was violation of a court order. Given the admitted evidence that Icelandair behaved in unorthodox fashion, from which it could easily be inferred that it knew Erna's flight was surreptitious, Alfredsdottir's reference to "'sneaking'" Erna and the girls out would have added little. As discussed in Part II.A.3. above, evidence of surreptitious intent was insufficient since Icelandair had not received legally sufficient notice of the court order. Admission of Alfredsdottir's statement could not have cured that defect.

C. Dismissal of Negligence Claims

Plaintiffs also contend that if we find the evidence insufficient to sustain the verdict in their favor for intentional interference with parental custody, they are entitled to a remand for a new trial on Elizabeth's claim of negligence and Frederick's claim of gross negligence, which the court refused to submit to the jury. We disagree.

In order to establish a negligence claim under New York law a plaintiff must show, *inter alia*, that the defendant owed the plaintiff a duty of care and breached that duty. *See, e.g., Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 79 (2d Cir. 1997). For example, in *Johnson v. Jamaica Hospital*, in which parents sued a hospital for negligent infliction of emotional distress resulting from the abduction of their infant daughter from the hospital nursery, the New York Court of Appeals held that the defendant hospital owed no duty directly to the parents to prevent the child's abduction. *See* 62 N.Y.2d at 526-30, 478 N.Y.S.2d at 839-41.

In the present case, Frederick similarly lacked a viable negligence claim because Icelandair owed him no duty of care. In relation to Icelandair, Frederick was a member of the general public; he had not entered into any special relationship with the airline. And although Icelandair certainly owed some duties of care to Elizabeth as a passenger, we have seen no authority for the proposition that a common carrier has a duty--either generally or based on oral representations--to ensure that a minor traveling with a custodial parent is not being transported in violation of a court order. As discussed in Part II.A.3. above, the telephone calls by Grayson to Icelandair's Orlando and Baltimore-Washington offices were insufficient.

CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found in them no basis for reversal. The judgment of the district court dismissing the complaint as a matter of law is affirmed.

No costs.

APPENDIX B

ELIZABETH JEANNE PITTMAN, a minor under 18 years of age by Frederick Pittman her father and legal custodian, and FREDERICK PITTMAN individually, Plaintiffs,

v.

ERNA (ETTA) PITTMAN GRAYSON a/k/a ERNA EYJOLFSDOTTIR, HELGI HILMARSSON, ICELANDAIR, a corporation, and GUDMUNDUR KARL JONSSON, Defendants.

93 Civ. 3974 (JSM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1997 U.S. Dist. LEXIS 9287

July 2, 1997, FILED

MEMORANDUM OPINION AND ORDER

JOHN S. MARTIN, JR., District Judge

On May 1, 1992, Erna Pittman Grayson (hereinafter "Erna Pittman") flew from John F. Kennedy International Airport to Iceland aboard an Icelandair flight with the two daughters she had from two previous marriages in violation of court orders issued in Florida which prohibited her from taking the children out of the state. Plaintiff Frederick Pittman commenced this action on behalf of himself and his daughter, Elizabeth Jeanne, against his ex-wife, her father, and Icelandair, alleging, in essence, that they conspired to deprive him of his right to custody of his daughter and her right to be with her father (hereinafter Frederick Pittman will be referred to as "plaintiff"). Since the ex-wife and her father were not in this country, the case went to trial solely against Icelandair. The jury found for the plaintiffs and awarded them a total of $15 million in compensatory and punitive damages. Defendant now moves to set aside that verdict and asks alternatively for a judgment as a matter of law or a new trial. For the reasons set forth below, the motions are granted.

THE FACTS ESTABLISHED BY THE PLAINTIFFS

In 1991, plaintiff's ex-wife was living in Florida with her two daughters. Plaintiff and Brian Grayson, the father of the other child, both obtained court orders prohibiting her from removing the children from Florida. In April 1992, Grayson became concerned that his ex-wife had left the state with the intention of taking the children to Iceland, which is her native country. On April 19th or 20th, Grayson called Icelandair's facilities in Orlando and Baltimore to ask if there were reservations in the names of Erna Eyjolfsdottir (Erna's maiden name), Pittman, Grayson, Etta or Ron Matlack, Elizabeth Jeanne Pittman, or Anna Nicole Grayson. He informed the persons with whom he spoke that he feared that

his ex-wife would flee to Iceland to avoid losing custody of the children, that there was a court order prohibiting them from leaving, and that they might be traveling under false names. The Icelandair agents told Grayson that there were no reservations under the names he had mentioned.

In fact, at the time of Grayson's call, Erna did have reservations for May 2nd for herself and the two girls, but under the name Hilmarsson. On April 24th, those reservations were changed to the name Karlsson and moved up a day. On May 1st, Erna and the two girls arrived at the Icelandair counter at J.F.K. International Airport with passports in their true names, tickets in the name Hilmarsson, and reservations in the name Karlsson. Although Icelandair's records established that they were checked-in by Icelandair's passenger service supervisor, Olav Ellerup, at trial, Ellerup denied having anything to do with their departure. Nonetheless, the jury was entitled to find that Ellerup did in fact process their departure and in that processing allowed them to travel on tickets not in the same name as their passports, despite an Icelandair policy that a passenger's tickets must match the name on the identification. The jury was also entitled to find that Ellerup made false entries on the weight and balance code to make it appear that the Karlsson party consisted of a male, a female, and a child rather than a female with two children.

Finally, there was evidence that Erna's father ran the duty-free shops in Iceland and was known to people at Icelandair.

DISCUSSION

Despite the jury's decision to the contrary, a review of the evidence presented at trial leads the Court to the conclusion that the evidence was not sufficient to justify imposing

liability on Icelandair for its role in transporting the plaintiff's daughter out of the country. In addition, even if the evidence was sufficient to establish that Icelandair conspired with Erna Pittman to deprive her ex-husband of the lawful custody of his child, the Court's charge was in error in articulating the theory on which the defendant could be held liable to the plaintiffs. Since an understanding of the error in the charge is helpful to an analysis of the legal obligation of the defendant to the plaintiff, the Court will begin with a consideration of the new trial motion.

A. The Motion for a New Trial

At the trial, the Court charged the jury that to find Icelandair liable to Plaintiffs it:

> must find that Icelandair knew that Erna Pittman had no right to take Elizabeth to Iceland and that by some wrongful act of its own aided or assisted her in removing the child from the United States.

(Record at 350).

Had the Court stopped at that point, the charge may have been appropriate. The Court stated later, however:

> Ordinarily, an airline has no obligation to determine whether a child traveling on one of its planes with a parent is under a court order that prohibits that travel. However, if an airline has actual notice that there is a court order prohibiting the parent from transporting the child to the place that is the plane's destination, it would be wrongful for the airline to transport the child.

Id.

While the first quoted sentence is correct, in hindsight the Court has concluded that the second sentence is wrong.

Even if one were to assume that Icelandair had been told that there was an order preventing Erna Pittman from taking the children to Iceland, that alone would not provide a basis for imposing liability on Icelandair.

At first blush, it may appear reasonable to tell an airline that it has a duty to refuse to transport anyone it has reason to believe is traveling in violation of a court order. But the corollary of that rule would require that the airlines have a right to deny any individual the right to travel because of suspicion that there may be some court order prohibiting that travel.

An airline does not, however, have an unfettered right to decide who should or should not travel. Airlines are common carriers and "as a general rule, a common carrier of passengers is bound to receive for carriage, without discrimination all proper persons who desire and properly offer to become passengers . . . ." *Semon v. Royal Indem. Co.*, 179 F. Supp. 403, 405 (W.D. La. 1959), *aff'd*, 279 F.2d 737 (5th Cir. 1960); *see, e.g., American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 406, 87 S. Ct. 1608, 1613, 18 L. Ed. 2d 847 (1967). Thus, an airline, as a common carrier, is in a much different position than other third-parties who have been held liable for assisting one parent in depriving another of his or her parental rights. In those cases, the third-party acted gratuitously and had no obligation to assist the parent. Here, Icelandair had a duty to transport anyone who sought to use its services and was not free to refuse to transport Erna Pittman and her daughters simply because Mr. Grayson stated that there was a court order prohibiting her from removing them from Florida.

While an airline does by statute have the right to refuse to transport someone who may pose a risk to himself or other passengers, the statutory exception is narrowly drawn. *See* 49 U.S.C.A. § 41310 (West 1997).

The courts should not lightly impose a duty on an airline to refuse to transport a passenger who can pay for a ticket. As the Supreme Court stated in *Kent v. Dulles*, 357 U.S. 116, 125, 127, 78 S. Ct. 1113, 1118, 1119, 2 L. Ed. 2d 1204 (1958), "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . Freedom to travel is, indeed, an important aspect of the citizen's 'liberty.'"

While obviously the Fifth Amendment does not apply to a private actor such as Icelandair, the importance of the right to travel in our society strongly suggests that the Court should be wary of imposing any obligation on a common carrier that might interfere with that aspect of an individual's liberty. Unfortunately, the charge of the Court did just that and, therefore, the defendant is, at a minimum, entitled to a new trial.

B. The Motion for Judgment as a Matter of Law

Defendant contends that, even accepting all of the plaintiffs' evidence, it did no more than its duty as a common carrier when it transported Erna Pittman and her daughters to Iceland and, therefore, it can not be liable to the plaintiffs for the injury they suffered as a result of that act. As the discussion of the new trial motion indicates, the Court agrees that liability to the plaintiffs cannot be premised on the mere fact that Icelandair transported Erna Pittman and the children to Iceland. But the record establishes more than that.

The evidence established that Mr. Ellerup, an Icelandair official, allowed plaintiff's daughter and his ex-wife to travel to Iceland using tickets in names that did not match the names on their passports and made false entries in the weight and balance codes to conceal the fact that the Karlsson party consisted of a woman and two children. In addition, the jury may well have found that Ellerup lied at trial to conceal his role in these actions. The question presented is whether Ellerup's actions are sufficient to establish that Icelandair joined in a conspiracy with Erna Pittman to deny her ex-husband his lawful right to the custody of his child.

At the trial, the Court charged the jury without objection:

> There is no dispute in this case that the action of Erna Pittman . . . in taking Elizabeth to Iceland was illegal and violated the rights of both Mr. Pittman and his daughter to have the daughter remain in the United States so that she could have such contact with her father as the courts of Florida deemed appropriate. A person who has such rights may recover damages from any person who unlawfully takes or withholds the child.
>
> Thus, if Erna Pittman was the defendant on trial here she would be liable to both Mr. Pittman and Elizabeth for the damages they suffered as a result of Elizabeth being taken to Iceland.

(Record at 349).

The tort of interference with parental rights of custody has been recognized in Section 700 of the Restatement

(Second) of Torts[1] and in numerous cases throughout the country, including New York. *See Kajtazi v. Kajtazi*, 488 F. Supp. 15, 18-21 (E.D.N.Y. 1978); *Casivant v. Greene County Community Action Agency Inc.*, 652 N.Y.S.2d 115, 117 (App. Div. 1996); *Lisker v. City of New York*, 72 Misc. 2d 85, 338 N.Y.S.2d 359, 364 (Sup. Ct. 1972); *Lloyd v. Loeffler*, 694 F.2d 489, 495-96 (7th Cir. 1982) (applying Wisconsin law); *Bennett v. Bennett*, 221 U.S. App. D.C. 90, 682 F.2d 1039, 1044 (D.C. Cir. 1982); *Wasserman v. Wasserman*, 671 F.2d 832, 834-35 (4th Cir. 1982) (applying Maryland law), *cert. denied, 459 U.S. 1014, 103 S. Ct. 372, 74 L. Ed. 2d 507 (1982); Fenslage v. Dawkins*, 629 F.2d 1107, 1109 (5th Cir. 1980) (applying Texas law); *Rosefield v. Rosefield*, 221 Cal. App. 2d 431, 34 Cal. Rptr. 479, 483 (Dist. Ct. App. 1963); *Kipper v. Vokolek*, 546 S.W.2d 521, 525 (Mo. Ct. App. 1977); *LaGrenade v. Gordon*, 46 N.C. App. 329, 264 S.E.2d 757, 758-59 (N.C. Ct. App.), *appeal dismissed*, 300 N.C. 557, 270 S.E.2d 109 (N.C. 1980); *Plante v. Engel*, 124 N.H. 213, 469 A.2d 1299, 1301-02 (N.H. 1983). Indeed, if the conduct had occurred more recently, Erna Pittman's actions would have violated the federal statute on international parental kidnaping. *See* 18 U.S.C. § 1204 (1994).

It has also been held that those who aid a parent in removing a child from the country in order to frustrate the other parent's right to custody are also liable to the injured parent. *See Kajtazi*, 488 F. Supp. at 18; *Lloyd*, 694 F.2d at

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[1] Section 700 provides: "one who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it as been left him, is subject to liability to the parent. *Restatement (Second) of Torts* § 700 (1977).

496-97; *Rosefield*, 34 Cal. Rptr. at 481; *Plante*, 469 A.2d at 1302. This liability rests on the long established principle that one who conspires with, or aids and abets, another to commit a tort is equally liable for the injury to the victim. *See Restatement (Second) of Torts* § 876 (1979); *see also General Electric Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 288 (2d Cir. 1992).

In order to find that Icelandair, by the actions of its employee Ellerup, joined a conspiracy with, or aided or abetted, Erna Pittman to deprive her ex-husband of his lawful right to the custody of his child two things must be established: 1) that he was aware of the wrongful nature of her conduct and 2) that he performed some act to further that unlawful purpose. Thus, the standard charge on membership in a conspiracy provides:

> the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of a least some of the purposes or objects of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

Leonard B. Sand et al., *Modern Federal Jury Instructions* 19-41 (Matthew Bender 1996) (Conspiracy Instruction 19-6); *see id.* at 11-3 (Aiding and Abetting Instruction 11-2).

Here the evidence was not sufficient to establish that Ellerup was aware of Erna Pittman's unlawful purpose to deprive her ex-husband of his lawful custody rights.

The actions of Mr. Ellerup in permitting Erna and the children to leave with tickets and reservations different from the names on their passports and his falsification of the weight and balance code to disguise the fact that the Karlsson party consisted of a woman and two children were sufficient to establish that he knowingly assisted her in an attempt to leave the country surreptitiously.

But that alone is not sufficient to establish liability. It is also necessary for there to be proof that he knew that Erna Pittman was trying to avoid detection because she was violating the custody rights of her ex-husband by taking his child out of the country.

The fact that Grayson had telephone conversations ten days earlier with Icelandair employees in Orlando and Baltimore in which he told them of the existence of a court order is not sufficient to establish that Ellerup was aware that Erna Pittman did not have the right to take her children to Iceland when he assisted them in the boarding process. There is no evidence that either of the two individuals with whom Grayson spoke passed on to Ellerup any of Grayson's statements and no reason in logic to assume that they did.

While it was obvious to Ellerup that Erna Pittman wished to avoid detection by someone when she was leaving the United States, that fact does not provide a basis for concluding that he knew she was acting in derogation of her ex-husbands' custody rights.

Erna Pittman's use of an assumed name in her travel plans is as consistent with the actions of a woman fleeing from an abusive and dangerous ex-husband as it is with an effort to deprive her ex-husband of his lawful custody rights. The desire for secrecy would be the same in both instances and, therefore, the use of assumed names cannot support an

inference that Ellerup was on notice that Erna Pittman was engaged in wrongdoing. Nor would the fact that the he falsified the weight and balance codes indicate which of the two possible scenarios he thought he was assisting. On these facts, it is as likely that Ellerup thought that he was being a Good Samaritan as it is that he knew he was joining a conspiracy.

The other fact from which an inference of knowing wrongdoing by Ellerup might be considered to flow is the evidence that he lied at trial when he denied processing Erna Pittman and the children at Kennedy International Airport. While the jury was entitled to conclude that he lied in this respect, there are a number of possible reasons that might cause him to lie, even though his conduct on May 1, 1992 was entirely blameless.

At the time Ellerup was first questioned about this incident, his employer was a defendant in a lawsuit seeking substantial damages for transporting Erna Pittman and the children. While far from laudable, it is not unusual for someone in Ellerup's position to try to distance himself from the problem by denying any participation in the events at issue. It is too great a leap to go from the conclusion that he testified falsely to the conclusion that he was aware of the existence of a valid court order that Erna was violating by taking the children to Iceland. *Cf. Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

The question of the significance to be attached to Ellerup's false testimony is analogous to the issue presented to the Second Circuit in its recent decision in *Fisher v. Vassar College*, 1997 U.S. App. LEXIS 13776, 1997 WL 310467, (*en banc*) (2d Cir. June 5, 1997), where in considering the weight to be given to a finding that an employer's statement of its reason for an employment

decision was a pretext, the court stated: "the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff." *Fisher*, 1997 WL 310467, at *7.

So here, the fact that Ellerup's denial of participation was false does not mean that he knew that Erna Pittman was illegally taking her children out of the United States. Yet, for Icelandair to be liable to the plaintiffs it is necessary for there to be proof not simply that it assisted her in disguising the fact that she was leaving the country, but also that it knew the reason for this was that she was taking the children in violation of their fathers' rights. Because that proof is lacking, Icelandair is entitled to a judgment as a matter of law.

CONCLUSION

For the foregoing reasons, the defendant's motion for judgment as a matter of law is granted, and, alternatively, defendant's motion for a new trial is granted.

SO ORDERED.

Dated: New York, New York
July 2, 1997

JOHN S. MARTIN, JR., U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourth day of February one thousand nine hundred and ninety-nine.

Elizabeth Pittman, et. al.,
Plaintiffs-Appellants,

v. Dkt No: 97-9066

Erna (Etta) Grayson, et. al.,

Defendants,

Icelandair, Inc.,

Defendant-Appellee.

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Elizabeth Pittman.

Upon consideration by the panel that decided that appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPELL,
Clerk

By:_____
Beth J. Meador,
Administrative Attorney